

Tax News: Spontaneous Exchange of Rulings – Practical Implications

Switzerland will introduce the international spontaneous exchange of information in tax matters into domestic legislation on the basis of the signed Convention on Mutual Administrative Assistance in Tax Matters (the MAC). This additional kind of exchange of information will be implemented by way of a revision of the Federal Act on International Administrative Assistance in Tax Matters, which should come into force on 1 January 2017. The Federal Council has published the draft of the revised Ordinance on International Administrative Assistance in Tax Matters, which contains detailed provisions on how the spontaneous exchange of information will be implemented, and is currently finalising the ordinance based on the comments received during the consultation phase.

Background

The Ordinance is mainly based on the international standards as published in the final report on BEPS Action 5 as well as on the practice of other states regarding the spontaneous exchange of information. The OECD in Action 5 recommends to introduce the spontaneous cross-border exchange of tax rulings that relate to harmful tax practices or potentially contradict the principles of BEPs.

Currently, the OECD-member states around the world are amending their regulations in this regard.

Ruling Definition

A tax ruling is defined according to the Ordinance as oral or written advice, confirmation or assurance of a tax authority that: (i) is given to a taxpayer upon request; (ii) covers the tax consequences of a set of facts described by the taxpayer and (iii) on which the taxpayer can rely.

Ruling Categories

The following categories of tax rulings might be subject of a spontaneous exchange of information:

- Rulings relating to the taxation as a holding company, a domicile company, a mixed company, with a principal allocation or a patent/license box;
- Unilateral tax rulings covering cross-border transfer prices;
- Cross-border rulings providing for an unilateral downward adjustment of the taxable income in Switzerland, that is not directly reflected in the financial statements;
- Cross-border rulings concerning the existence or absence of, and / or the attribution of profits to, a permanent establishment;
- Cross-border rulings related to conduit structures (as channeling via hybrid entities / hybrid flows).

Scope of Exchange

Generally, only information with regard to income taxes, capital taxes or withholding taxes could be subject to a spontaneous exchange. Not in scope of a potential spontaneous exchange are VAT, stamp duties, customs or social security contributions. With respect to rulings, in line with BEPS action 5, the spontaneous exchange should require a connection to a business.

The exchange of information will occur by the exchange of templates summarizing the relevant facts of a ruling. Such templates will be exchanged depending on the ruling categories to states entitled to receive them, provided the respective state has implemented the rules for the spontaneous exchange of information. In particular, such information (not the ruling itself) will be spontaneously exchanged with tax authorities of the residence country of the ultimate parent and the immediate parent of the company that is object of the ruling. In addition, rulings will also in principle be exchanged with tax authorities of the country of residence of all related parties with which the tax payer enters into a transaction (if the transaction is dealt with in the ruling). Finally, the exchange will also be made with tax authorities of other countries of residence of related parties, e.g. headquarter or branch, depending on the specific type of ruling.

Relevant Timeframe

Based on the Ordinance, all new rulings (falling in one of the respective categories) will be subject of the spontaneous exchange of information as of 1 January 2018 (or 1 January 2017 if Switzerland enters into specific agreements on this matter with one or more jurisdictions). Tax rulings (falling in one of the respective categories) issued after 1 January 2010 and still effective on 1 January 2018 (or 2017 in case of specific agreements) would be subject of the spontaneous information exchange.

The states receiving the information in the templates are entitled to request further and more detailed information, e.g. a copy of the ruling, based on the applicable double tax treaty provision.

Recommendation for Action

It is generally recommended that taxpayers and especially international companies analyze all their Swiss tax rulings in place and assess which would be covered by the spontaneous exchange. The taxpayer can decide to request the tax authority to cancel certain tax rulings before end of 2017 (or 2016, see above) or can file amended rulings.

For future rulings covered by the spontaneous exchange, the summary template should be prepared together with the ruling.

Further, the taxpayer has, similar to cases of exchange of information on request, the possibility to appeal against the exchange of the ruling information.

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